

2001 JAOAC

FISCAL LAW IN CONTINGENCY OPERATIONS

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I. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS

A. UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

1. Scope. Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of armed forces under Chapter VII of the UN Charter—
 - a. Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.
 - b. Supplies, Services, & Equipment. Furnishings of facilities, services or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.
2. Reimbursement. Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to as assessed peacekeeping operation.
3. Delegation of authority. The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206 ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

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B. Drawdowns.

1. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1).* Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to \$100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from \$75M to \$100M).
2. *FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2).* Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to \$200M from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from \$150M to \$200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than \$75M may come from DOD resources; not more than \$75M may be provided for counternarcotics; and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *See* Defense and Security Assistance Improvements Act, Pub. L. 105-164 (1996).
3. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2).* Authorizes the President to direct the drawdown of up to \$25M in any fiscal year of commodities and services from any federal agency for unforeseen emergencies when deemed important to U.S. national interests.

C. Reimbursable Support.

1. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.
2. *FAA § 632, 22 U.S.C. § 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.

3. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (e.g., Department of State).
4. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. §§ 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.
5. *Leases - AECA §§ 61-62, 22 U.S.C. §§ 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.
6. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350* - DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

II. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS

- A. Appropriations. \$55.9M in FY2001 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under 10 U.S.C. §§ 401 (only for humanitarian demining), 402, 404, 2547, and 2551.
- B. Humanitarian & Civic Assistance (HCA). 10 U.S.C. § 401. *See also*, DOD Dir. 2205.2, 6 Oct 1994; DOD Inst. 2205.3, 27 Jan 1995.

1. Need for Express Authority.
 - a. *41 U.S.C. § 12*: “No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury *appropriated for the specific purpose*.”
 - b. *63 Comp. Gen. 422 (1984)*: “[I]t is our conclusion that DoD’s use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a).”
2. Scope of Authority. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote
 - a. The security interests of the U.S. and the country where the activities will be carried out; and
 - b. The specific operational readiness skills of the servicemembers who will participate in the activities.
3. Limits.
 - a. May not duplicate other forms of U.S. economic assistance.
 - b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.
 - c. SecState must specifically approve assistance.
 - d. Must be paid out of funds appropriated for HCA.

- e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operations), or provide such assistance as part of a military operation not involving U.S. forces.
- 4. Definition. HCA means—
 - a. Medical, dental, veterinary care in rural areas;
 - b. Construction of rudimentary surface transportation systems;
 - c. Well drilling and construction of rudimentary sanitation facilities;
 - d. Rudimentary construction and repair of public facilities; and
 - e. Detection and clearance of landmines, including education, training, and technical assistance.
- 5. Exercise-Related Construction (ERC) distinguished.
10 U.S.C. § 2805(a)(2).
 - a. “Funds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program.*” --S. Rep. 355, 102d Cong., 2d Sess. 10 (1992)(emphasis added).
- 6. Appropriations. Specifically fenced O&M for HCA. Demining, however, uses OHDACA.
- C. Transportation of Humanitarian Relief Supplies for NGOs. 10 U.S.C. § 402.
 - 1. Scope of Authority. SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.
 - 2. Preconditions. Before transporting supplies, SecDef must determine—

- a. The transportation of the supplies is consistent with U.S. foreign policy;
 - b. The supplies to be transported are suitable for humanitarian purposes and are in usable condition;
 - c. A legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;
 - d. The supplies will, in fact, be used for humanitarian purposes; and
 - e. Adequate arrangements have been made for the distribution of the supplies in the destination country.
3. Limits. Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

D. Foreign Disaster Assistance - 10 U.S.C. § 404.

- 1. Scope of Authority.
 - a. General. President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.
 - b. Delegation of Authority. President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).
- 2. Types of Assistance. Transportation, supplies, services, and equipment.

3. Notice to Congress. Within 48 hours of commencing relief activities, President must transmit a report to Congress.
 4. Appropriations. Funded from the OHDACA appropriation.
- E. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2547.
1. Scope of Authority. SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.
 2. Limits. Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.
 3. Definition. “Nonlethal excess supplies” means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.
- F. Humanitarian Assistance. 10 U.S.C. § 2551.
1. Scope.
 - a. General. To the extent provided in authorization acts, funds appropriated to DOD for humanitarian assistance shall be used for providing transportation of humanitarian relief and *other* humanitarian purposes worldwide.
 - b. Availability of Funds. To the extent provided in the appropriations acts, funds appropriated for humanitarian assistance remain available until expended .
 2. Reports. Statute contains detailed annual reporting requirements.
 3. Appropriations. Funded from the OHDACA appropriation.

4. § 2551/§ 401 Distinguished. If it fits § 401 in each and every particular, it's § 401 HCA. If not (but for humanitarian purpose) it's § 2551 HA.

III. SPECIAL AUTHORITIES.

- A. CinC Initiative Funds (CIF). 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY 2001, Pub. L. No. 106-259 (2000) (\$25M for CIF in FY 2001 in Defense-wide O&M); DoD Dir. 7280.4, 26 Oct 1993; CJCSI 7401.01A, 30 Jan 1999.

1. Scope. CJCS may provide to CinCs (including NORAD) sums appropriated for the following activities:
 - a. Force training.
 - b. Contingencies.
 - c. Selected operations.
 - d. Command and Control.
 - e. Joint Exercises (including participating expenses of foreign countries).
 - f. Humanitarian and Civic Assistance (HCA).
 - g. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).
 - h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.
 - i. Force protection.

2. **Priorities.** CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a CinC's AOR that would reduce threats to, or enhance, U.S. national security.
3. **Relationship to Other Funding.** Any amount provided as CinC initiative funds for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."
4. **Limits.** 10 U.S.C. § 166a(e). Of funds made available—
 - a. No more than \$7M may be used to buy end items with a cost greater than \$15,000;
 - b. No more than \$1M may be used to pay the expenses of foreign countries participating in joint exercises;
 - c. No more than \$2M may be used for education and training to military and related civilian personnel of foreign countries; and
 - d. No funds may be used for any activity for which Congress has denied authorization.

B. **Emergency & Extraordinary (E&E) Expenses.** 10 U.S.C. § 127.

1. **General.** Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated). 10 U.S.C. § 127(b).
2. **Congressional Notification.** DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of \$1 million and five days advance notice for expenditures or obligations between \$500K and \$1M. Pub. L. No. 104-106, § 915 (1996).

3. Appropriations. \$10.616M for Army; \$5.146M for Navy and Marine Corps; \$7.878M for Air Force; and \$30M for SecDef. DoD Appropriations Act for FY 2001, Pub. L. No. 106-259 (2000).
- C. Contingency Operations Funding Authority. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003 (1996)).
1. Applicability. Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed \$50 M, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of \$100M. Does *not* apply to operations with incremental costs not expected to exceed \$10M.
 2. Consequences.
 - a. Waiver of Working Capital Fund (WCF) Reimbursement. Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if any activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)
 - b. Transfer Authority. Authorizes SecDef to transfer up to \$200M in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.
 3. Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.

4. Overseas Contingency Operations Transfer Fund (OCOTF). DoD Appropriations Act for FY 2001, Pub. L. No. 106-259, Title II (2000). Appropriates \$3.94B of “no-year” funds “for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces.” These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. H.Rep. 106-754, the Conference Report accompanying the Appropriations Act, states this amount covers the estimated costs of continuing operations in Bosnia, Kosovo, and Southwest Asia. See, DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 17, Contingency Operations (June 2000) and DoD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency Operations (Sep 1996).

IV. SECTION 8070 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2001, PUB. L. NO. 106-259, § 8070 (2000).

- A. General. Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. *See also* DoD Appropriations Act for FY 96, Pub. L. 104-61 § 8117 (1995).
- B. Notice Requirement. The notice required includes.
 1. A description of the articles or services to be transferred;
 2. The value of the articles or services; and
 3. With respect to a proposed transfer of supplies and equipment, a statement of
 - a. Whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and

- b. Whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.
- C. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126) which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about the *diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in “essentially non-defense activities in support of foreign policy.” H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).
- D. President's Interpretation. In “acquiescing” in the Appropriations Act, the President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).
- E. Scope.
 - 1. Included Activities. Section 8070 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include—
 - a. Acquisition and Cross-Servicing Agreements during peace and humanitarian assistance operations. 10 U.S.C. §§ 2341-2350.
 - b. Drawdowns for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).
 - c. Humanitarian & Civic Assistance (HCA). 10 U.S.C. §§ 166a(b)(6), 401.
 - d. Transportation of humanitarian assistance to the extent the service is provided to another nation or an international organization. 10 U.S.C. § 2551.
 - e. Excess non-lethal supplies for humanitarian relief. 10 U.S.C. § 2547.

- f. Reimbursable support to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent the DoD transfers articles or services to another nation or international organization. 31 U.S.C. § 1535; FAA § 632.
 - g. Landmine clearance activities. FY 1995 DoD Authorization Act, Pub. L. No. 103-337, § 1413 (1994).
- 2. Excluded Activities. Section 8070 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include—
 - a. Exercises in which the DoD pays the incremental expenses of participating developing countries—including Partnership for Peace (PFP) exercises. 10 U.S.C. § 2010.
 - b. SOF training. 10 U.S.C. § 2011.
 - c. Bilateral/regional conferences and seminars unconnected with peace and humanitarian assistance operations. 10 U.S.C. § 1051.
 - d. LATAM Coop unconnected with peace and humanitarian assistance operations. 10 U.S.C. § 1050.
 - e. Military to military contacts. 10 U.S.C. § 168.
 - f. EDA authorities (FAA § 516) which already have congressional notice requirements equal to or in excess of 15 days.
 - g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (e.g. coalition operations in time of war).

F. Compliance. DoD complies with section 8070 by—

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or
2. Transferring supplies and services in such operations without congressional notification when—
 - a. Providing disaster relief;
 - b. Providing support *without* using funds appropriated to DoD (e.g. “advance of funds” basis); or
 - c. Providing support under an FMS case.

V. CONCLUSION.